SUPREME COURT, U. S.

71-526

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

No._____

OCTOBER TERM, 1971

FLOYD W. FREED, III

Petitioner,

vs.

THE ERIE LACKAWANNA RAILWAY COMPANY, A CORPORATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

C. RICHARD GREISER,
8 E. Broad St.,
Columbus, Ohio 43215,
Attorney for Petitioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43215

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A CORPORATION

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BY COURTS BELOW

Petitioner, Floyd W. Freed, III, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment of that court in Case No. 20,872, entitled Floyd W. Freed, III, vs. the Erie Lackawanna Railway Company, which judgment was entered in accordance with the opinion of that court dated July 16, 1971, reported in 445 Fed. 2d 619 (Appendix B), and which judgment affirmed the judgment of the United States District Court for the Northern District of Ohio, Eastern Division, wherein judgment was rendered in favor of respondent and against petitioner. Petitioner's motion for new trial in the District Court was denied and the unreported decision of the trial court on that motion, filed June 26, 1970, is appended to this petition (Appendix A).

JURISDICTION OF THE COURT

The entry of the judgment of the United States Court of Appeals for the Sixth Circuit of which review is sought was dated and filed July 16, 1971. (Appendix C)

This action arose and was tried under the provisions of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following. Jurisdiction of this Court to review the said judgment of the United States Court of Appeals for the Sixth Circuit by writ of certiorari is, accordingly, conferred upon this Court by the provisions of the Act of June 25, 1948, c. 646, 62 Stat. 929, Title 28, U.S.C., Section 1254. The portions of that section pertinent to jurisdiction in this review provide as follows:

> "Cases in courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; * * * ."

QUESTIONS PRESENTED FOR REVIEW

1. In this action brought by petitioner against respondent in the United States District Court for injuries incurred on property owned and controlled by the respondent railroad corporation, where the verified answer of the respondent to a pre-trial interrogatory, admitted into evidence at the trial, stated that the place where petitioner was injured was not within yard limits, was that designation (1) an admission against the interests of respondent and (2) binding upon respondent?

2. Where respondent by the foregoing sworn answer to interrogatory had stated that the place where petitioner was injured was not within yard limits and respondent had promulgated an operating rule applying to train movements except in yards, was the United States Court

of Appeals for the Sixth Circuit correct in holding that such an answer was comparable to mistaken answers in depositions or during the course of the trial and not binding upon respondent?

3. What rule should be applied to the sworn answer of a party to an interrogatory admitted into evidence, where the subject matter is both under the control of and within the knowledge of the answering party?

4. When the jury during deliberation submitted a written question to the court as to whether the pertinent train movement during which petitioner was injured was a road or yard movement, was the trial court correct in refusing to instruct the jury that the respondent's answer to the interrogatory that the place where petitioner was injured was not within yard limits was either: (1) an admission against the interests of respondent, or (2) an admission against interest and binding upon it?

STATUTES INVOLVED

So far as petitioner knows, the issues presented for review in this petition do not involve the interpretation of any statute or regulation, but do involve the federal question of the effect of an answer to an interrogatory by an adverse party when duly admitted into evidence.

STATEMENT OF THE CASE

This action was filed and tried in the United States District Court for the Northern District of Ohio, Eastern Division, under the provisions of the Federal Employers' Liability Act, Title 45, U.S.C., Sections 51 and following. The jurisdiction of that court over this action was not disputed and was specifically conferred by Section 6 of that Act, Title 45, U.S.C., Section 56.

On August 23, 1966, petitioner was the head brakeman in respondent's railroad crew operating a freight train from Cleveland to Youngstown, Ohio. (R. 135, 136) At that time petitioner was 19 years of age (R. 131). During the course of that run, the freight train entered the North Randall area in Cuyahoga County, Ohio, moving east on the eastbound main track. Immediately south of the eastbound main track was a parallel track called the eastbound siding track. Ohio State Route 8 underpassed these and other tracks. To the west of this underpass was a switch controlling the juncture of the eastbound siding track with a track called the Fetzer lead track, which extended to the west and joined with another track extending to the west and into the area of the depot at North Randall. To the east of the underpass the eastbound main track and the adjacent and parallel eastbound siding track extended for a considerable distance. There were no switches or any other tracks adjoining either the eastbound main or the eastbound siding track east of that underpass.

The train was stopped west of the underpass while one car was removed and a unit was placed into the train. The train then started to move east slowly. In accordance with common practice (R. 325, 326), petitioner and the fireman got off the slowly moving locomotive after it had passed east of the underpass, intending to go to one of the restaurants located south of the North Randall area to eat. The two went directly across the adjacent eastbound siding and onto the south side of that siding track. (R. 54, 61) The fireman who had forgotten his cigarettes walked eastward along the south side of this siding to a point where the cigarettes were thrown to him from the cab of the moving locomotive. Petitioner, standing south of the south rail of the eastbound siding track with his head turned toward the east where his

fireman was located, was struck from behind by the corner of a caboose which was being moved east on that eastbound siding. (R. 141, 334, 338) As a result petitioner suffered severe and permanently crippling injuries to his right arm. (R. 202-241)

The movement on the side track was under the control of another crew of respondent. At the time that petitioner was struck, a locomotive, with the front end headed toward the west, was backing east shoving a caboose which had been attached to the east. To the west several cars were coupled to the locomotive and the purpose of the movement was to move the entire train to the east a sufficient distance so that the west end of the train was clear of the switch located immediately west of the Ohio Route 8 underpass. As this eastward movement was made, there was only one man in the cab of the locomotive, and he was on the right hand or north side of the locomotive, that is, on the side opposite from where petitioner was standing. (R. 280, 281) There was no employee either in the caboose or on the east or leading end of the caboose as it was being moved east. (R. 281) The point where petitioner was struck was considerably east of the Ohio Route underpass. (R. 140, 141, 334, 338)

Operating rules promulgated by respondent and applying to all employees in both railroad crews were admitted into evidence. (Plaintiff's Exhibit 3, R. 134, 242, 243) Rule 103 provided in its pertinent part:

> "When cars are pushed by an engine, except when shifting or making up trains in yards, a trainman must take a conspicuous position on the leading car. * * *"

The undisputed evidence was that the caboose being moved by the locomotive was a car within the meaning of the foregoing rule. (R. 322)

Prior to trial respondent under oath by its attorney made the following answer to the following interrogatory No. 7(a), which interrogatory and answer were read and admitted into evidence (R. 108):

> "Question No. 7(a): With respect to the time and place where said Floyd W. Freed, II was injured as referred to in Paragraph 5 of plaintiff's complaint in Paragraph 1 of defendant's answer, was said place within any designated yard limits or territory of defendant?
> Answer to 7(a): The place specified in this interrogatory is not within defendant's yard limits."

Following arguments to the jury and instructions by the court, the jury commenced to deliberate on Friday, October 3, 1969, at 1:30 p.m. Those deliberations continued for the remainder of Friday and also on the following Monday morning. During the morning deliberation the following question in writing was sent by the jury to the court (R. 446):

> "Was the backward movement of the hump train, considered road work when part of the train was still in the yard limits?"

The court called attorneys for both parties into chambers and attorney for petitioner requested the court to instruct the jury that the respondent by answer to its interrogatory, admitted into evidence, had stated that the place where this accident occurred was not within yard limits and that the respondent should be bound accordingly. The court recalled the jury to open court and refused to answer the jury's question and failed to instruct on or to refer to the foregoing answer of respondent to the interrogatory. On the contrary, the court instructed the jury that it was up to them to decide this question. The jury then retired to the deliberating room

and counsel for petitioner repeated his foregoing request. (R. 446-448)

On that same morning, the jury returned a verdict for the respondent and judgment was entered thereon. (R. 451)

In motion for new trial, petitioner assigned as grounds, among others, the refusal of the trial court to instruct the jury with respect to the effect of respondent's answer to the interrogatory.

The District Court overruled petitioner's motion for new trial and the United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court.

ARGUMENT

Questions 1, 2, 3 and 4

This Court should grant writ of certiorari to review and resolve the important federal questions presented in this petition. The fundamental question underlying all four is this: May a party to an action rely upon an answer under oath made by the opposing party in a pre-trial interrogatory, where that answer sets forth a precise fact or designation at a precise location and time and where that answer relates to a matter or a factor under the control of and within the knowledge of the adverse party? To our knowledge, this important federal question has not been settled by this Court. It is particularly timely that this question involving practically all federal civil litigation should be settled now. The District Courts are placing more and more emphasis upon pre-trial discovery and disclosures. In fact, in many districts pre-trial disclosure of all relevant evidence is mandatory; and in those districts any evidence which is not so disclosed is precluded from the trial. The fundamental philosophy of litigation which these courts are imposing upon the litigants, therefore, requires complete pre-trial disclosure and the elimination of surprise.

It is clear that the decision of the District Court and of the United States Court of Appeals for the Sixth Circuit in this case runs counter to that prevailing philosophy. The answer of the respondent to the interrogatory involved in this case had been made and filed long prior to the trial. That answer was, moreover, precise and unequivocal. The place where the petitioner was injured was not within yard limits. Not only was the answer unequivocal, but it embraced a subject matter which was within the peculiar power and knowledge of the answer-

ing party, the respondent railroad. The respondent had the power to and did determine what designation should be made with respect to railroad operations at the time and the place in question. By fiat it could and did define what railroad territory was within yard limits. Contrary to the statement in the concurring opinion in the United States Court of Appeals for the Sixth Circuit, yard limits are expressly and precisely defined in railroad operations, similar to the boundaries of corporate cities or towns. Respondent, moreover, promulgated the operating railroad rule requiring a man on the leading car in train movements except when "in yards," and respondent had the right and power to enforce that rule.

The underlying fundamental issue in this case was crucially presented since the jury directed a question to the court specifically relating to the very fact which was the core of the answer to that interrogatory and which fact was controlling on whether the operating rule applied to the movement during which petitioner was injured. If so, the rule was violated under the undisputed evidence.

Thus, the decision on the effect of that sworn answer and the court's instruction thereon (in this case the failure to so instruct) came at a pivotal time in the deliberation of the jury.

Under the circumstances was that answer an admission against interest? Was it binding? Should the jury have been so instructed in response to its specific question?

The District Court and the United States Court of Appeals for the Sixth Circuit answered "No" to those questions. The majority of the Sixth Circuit held that the respondent's answer to the pre-trial interrogatory was comparable to a mistaken answer given in deposi-

tion testimony or during the course of the trial itself, and held that respondent was not bound by that answer. The concurring member of that court apparently sought to confine the decision to a rule that answers to interrogatories are *not always* binding upon the answering party. The latter principle is apparently the proposition which concurring Judge Peck reads in decisions from other circuits. *Victory Carriers, Inc. vs. Stockton Stevedoring Company,* 338 Fed. 2d 955 (9th Circuit, 1968); *Helig vs. Studebaker Corporation,* 347 Fed. 2d 686 (10th Circuit, 1965); *Gadaleta vs. Nederlandsch-Amerekaansche Sloomvart,* 291 Fed. 2d 212 (2nd Circuit, 1961). The concurring member would, therefore, leave open the question whether under some circumstances the answer to an interrogatory may be binding upon a party. Query: what circumstances?

The majority rendering the opinion in the United States Court of Appeals for the Sixth Circuit seemed to read the decisions from other circuits differently and announced a broader rule of law, namely, that answers to interrogatories are *never* binding when they are in conflict with other answers obtained through other questioning, either by way of deposition or trial.

In any event, it is clear that there is a conflict among the members of the United States Court of Appeals for the Sixth Circuit and with decisions in other circuits with respect to whether a sworn answer to an interrogatory may under some circumstances be binding upon the answering party.

There is, furthermore, a conflict between the decision of the United States Court of Appeals for the Sixth Circuit in this case and that of the same court in the case of *Gridiron Steel Company vs. Jones & Laughlin Steel Corporation,* 361 Fed. 2d 791 (6th Circuit, 1966). The

majority opinion seeks to distinguish the *Gridiron Steel Company* case from the instant case by stating that *Gridiron Steel* is authority for the rule that answers to interrogatories when introduced into evidence may be utilized as admissions, but it does not hold that such admissions are binding. We infer from that statement that the Court of Appeals held that the answer to the pertinent interrogatory in this case constituted an admission against the interests of respondent. Yet, the Court of Appeals in this case approved the refusal of the trial court to instruct the jury that such answer was an admission against respondent's interests.

This was contrary to the decision in *Gridiron Steel.* The Court of Appeals in that case held that answers to interrogatories by one of the parties placing valuations on property involved in the litigation constituted admissions against the interests of the answering party, although not binding upon the party propounding the interrogatories. The case was reversed and remanded to the court below, the trier of the facts, with directions to proceed accordingly. Hence, consistency required that the trier of the fact in this case, the jury, be *at least* instructed that the pertinent answer by respondent was an admission against its interests.

Indeed, petitioner submits that the *Gridiron Steel* decision did in effect direct the trial court on remand to consider the answers as binding upon the party making them.

In any event, there is a clear conflict between the two decisions in the United States Court of Appeals for the Sixth Circuit as to what instruction or direction is to be given with respect to a sworn answer to an interrogatory which has been made by a party and admitted into evidence.

A reading of the opinion of the United States Court of Appeals for the Sixth Circuit in this case, in summary, produces the following conflicting interpretations: (1) a written pre-trial answer under oath by a party to an interrogatory admitted into evidence is never binding upon that party at the trial; (2) such an answer is not always binding upon the party, but the question is open as to whether or not in some circumstances it may be binding; (3) such a written answer may be utilized as an admission against interests, but the opposing party does not have the right to have the jury so instructed. The third interpretation is, moreover, in conflict with the prior decision of the same Court of Appeals in the above cited case of *Gridiron Steel Company vs. Jones & Laughlin Steel Corporation,* 361 Fed. 2d 791 (6th Circuit, 1966).

Those conflicting interpretations should be resolved and finally settled by this Court. The effect to be accorded to sworn answers to interrogatories is indeed an important federal question in this day of progressively developing pre-trial procedures and requirements.

Respectfully submitted,

C. RICHARD GRIESER,
8 East Broad Street,
Columbus, Ohio 43215,
Attorney for Petitioner.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil No. C67-133

FLOYD W. FREED, III

v.

ERIE LACKAWANNA RAILROAD COMPANY

MEMORANDUM AND ORDER RE: MOTION FOR NEW TRIAL

[Filed June 26, 1970]

KALBFLEISCH, J.

This action was brought pursuant to the Federal Employers' Liability Act and arose from an accident in which the plaintiff, an employee of the defendant, sustained personal injuries when he was struck by the defendant's train. Plaintiff has moved for a new trial upon several grounds relating both to the sufficiency and weight of the evidence and to composition of the jury before which the case was tried.

Plaintiff argues that the verdict was not sustained by sufficient evidence and that the verdict was contrary to the manifest weight of the evidence. In considering the issues thus presented, this Court is not free to reweigh the evidence and set aside a verdict merely because the jury could have drawn inferences or conclusions different from what they did, or because the Court feels that a different result is more reasonable. *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29 (1944), rehearing denied 321 U. S. 802.

Though certain aspects of the incident involved in this case passed unobserved by any of the witnesses who testified at the trial, there is very little conflict in the evidence as to the facts and circumstances about which testimony was elicited at trial. Thus it is the inferences and conclusions to be drawn from the known circumstances which constituted the focal point of the trial and which are again raised by this branch of plaintiff's motion.

Assuming all the facts to be as the plaintiff now argues them, there is no basis for the Court to hold that the defendant was negligent as a matter of law. Despite plaintiff's vehement argument that the "undisputed evidence" reveals conduct which should be characterized as negligent, it is precisely this characterization, absent conduct which amounts to negligence as a matter of law, which must be made by the jury and not by the court.

Plaintiff also asserts that the Court failed to properly instruct the jury as to the effect of defendant's answer to an interrogatory posed by the plaintiff which was read into evidence during the trial. The answer given by the defendant would appear to have a bearing upon whether or not certain safety rules of the defendant railroad applied to the activities of the defendant at the time of the accident.

As noted, the interrogatory and the answer were read into evidence on behalf of the plaintiff. The effect thereof was argued to the jury by plaintiff's counsel. Further, the Court instructed the jury that interrogatories and answers thereto which were read into evidence must be weighed and considered as evidence in the case. The Court does not question the rule in *Gridiron Steel Co. v. Jones & Laughlin Steel Corp.*, 361 F. 2d 791 (6th Cir. 1966) that an answer to an interrogatory can be intro-

duced in evidence as an admission against interest; the answer here in question was so admitted in this case and argued as such by counsel for the plaintiff.

However, there was also testimony in the case that the train crew, under the circumstances existing at the time of the accident, did not consider the safety rule invoked by plaintiff as applicable to the work then being performed. Further, the plaintiff does not dispute the rule which holds that a violation of a safety rule does not constitute negligence as a matter of law; but, rather, the safety rule itself and the conduct of the defendant are to be considered by the jury, along with all the other facts and circumstances, in determining the proper standard of care and whether or not the defendant's conduct met that standard. See *Teets v. Chicago, South Shore & South Bend Railroad,* 238 F. 2d 223 (7th Cir. 1956); *Frabutt v. New York, C. & St. L. R. Co.,* 88 F. Supp. 821 (W. D. Pa. 1950).

The jury could reasonably conclude from the evidence that the provisions of the safety regulation relied upon by the plaintiff did not define the proper standard of care under the circumstances found from the evidence or that violation of the rule by the defendant, if found, did not constitute negligence. Thus the allegation of error in this regard is without merit.

Regarding plaintiff's challenge to the jury which tried the case, it is asserted that the prospective jurors called for the case, as well as the panel which was eventually chosen to try the case, did not constitute a fair cross-section of the community or of all the citizens thereof. The argument is that the composition of the jury in this case was contrary to the Declaration of Policy of the Jury Selection and Service Act of 1968 (28 U. S. C. §1861 et seq.).

It is manifest from the memorandum, supplemental memorandum, reply brief and statistical information submitted in support of the motion that the plaintiff does not claim systematic exclusion of any particular class of persons through the operation of the jury selection system adopted in this district, nor does he assert that any person or persons connected with the selection of prospective jurors has attempted to systematically exclude any class of persons from jury service. Rather, the plaintiff complains that this particular group of jurors did not proportionately reflect the composition of the community as to age, sex and race.

The right to a trial by jury does not entitle one to a jury tailored to the particular circumstances of the case, but requires only that the jury be indiscriminately drawn from among those in the community eligible for jury service untrammeled by any arbitrary or systematic exclusions. *Hoyt v. Florida*, 368 U. S. 57 (1961). In the case just cited, Mr. Justice Harlan noted that the argument made here by the plaintiff is "surely beside the point." He went on to quote the opinion in *Hernandez v. Texas*, 347 U. S. 475 (1954):

> "Circumstances or chance may well dictate that no persons in a certain class will serve on a particular jury or during some particular period." (At p. 65.)

Both plaintiff and defendant were presented with a typewritten list of prospective jurors; the list included the name, address and place of employment of all members of the panel. Before the trial commenced, the prospective jurors from which the jury was to be selected were brought into the courtroom and made to stand during administration of the voir dire oath; they remained in the courtroom throughout the entire jury selection process. At this time plaintiff and his counsel

had ample opportunity to observe and ascertain the characteristics of each juror, as well as the composition of the entire group, which he now claims as a basis for his objections. When the voir dire was concluded and preemptory challenges exercised, the plaintiff indicated he was satisfied with the jury. The plaintiff at no time objected to or challenged the array or panel upon the grounds now asserted.

Upon receiving an adverse verdict, plaintiff seeks a new trial upon this bizarre statistical hypothesis. Challenges to the array go to the manner of making up the whole venire, and relate to the legality of drawing, summoning, selecting or impaneling the Federal petit or grand jury. Challenges to the petit jury array in civil and criminal cases are a right which may be waived if not seasonably presented. See *Frazier v. United States*, 335 U. S. 497, rehearing denied 336 U. S. 907; *Shotwell Mfg. Co. v. United States*, 371 U. S. 341, 362 (1963).

In that exclusion of certain groups or classes complained of here resulted not from arbitrary or systematic action, but from chance, the challenge to the composition of the jury is not well taken.

IT IS ORDERED, therefore, that the motion of the plaintiff for a new trial is overruled.

GIRARD E. KALBFLEISCH,
United States District Judge.

APPENDIX B

No. 20,872

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

FLOYD W. FREED, III,
Plaintiff-Appellant,
v.
THE ERIE LACKAWANNA RAILWAY COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Ohio, Eastern District.

Decided and Filed July 16, 1971

Before: PECK, BROOKS and KENT, Circuit Judges.

PER CURIAM. Plaintiff-appellant, Floyd W. Freed, III, brought this action under the Federal Employer's Liability Act against defendant-appellee, Erie Lackawanna Railway Company, for personal injuries sustained when he was struck by a train. This appeal follows a jury verdict for the defendant.

At the time plaintiff was injured, he was the head brakeman on a freight train running from Cleveland to Youngstown, Ohio. The accident occurred in the North Randall switching area where there were numerous sets of tracks and switching operations were frequent. The plaintiff and the fireman, a fellow crewman, had just dropped off their train and had started walking down a right-of-way adjacent to a side track on their way to lunch when plaintiff was struck by a caboose, which was the lead car of a switching train that was slowly backing in performance of its switching assignment. Seconds before getting in the path of the train, plaintiff's

attention was diverted when the fireman turned and called to the engineer of the freight train to throw him his cigarettes which he had forgotten and left in the cab of the locomotive.

The principal issue raised by plaintiff on appeal is whether an answer made by the defendant to an interrogatory is binding on it although contradicted by other evidence adduced by the defendant. In response to one of plaintiff's interrogatories, defendant stated that the location of the switch train at the time of the accident was not within the yard limits. A train that is not within yard limits was subject to road rule Number 103 which requires cars being pushed by engines in an area outside the yard limits to have a lookout posted on the lead car. There was no such lookout on the car of the switch train that injured the plaintiff. At trial the defendant produced testimony that the switch train was actually operating within the yard limits and, therefore, no lookout on the lead car was required, thus contradicting the answer given in the interrogatory as to the location of the train at the time of the accident.

While the jury was deliberating, the jury foreman submitted a question to the court asking if the switch train was within the yard limits at the time of the accident. The court declined to answer the question on the grounds that it involved a question of fact which it was the duty of the jury to resolve. Plaintiff argues that the answer to the interrogatory, when introduced in evidence, was an admission against interest and binding on the defendant, and therefore the court should have answered the jury's question in accordance with the answer given in the interrogatory. In support of this argument, reliance is placed on *Gridiron Steel Company v. Jones & Laughlin Steel Corporation,* 361 F. 2d 791 (6th Cir.

1966). Such reliance is misplaced. While the cited case is authority for the rule that answers to interrogatories when introduced in evidence may be utilized as admissions, it does not hold that such admissions are binding. And see, *Victory Carriers, Inc. v. Stockton Stevedoring Company,* 388 F. 2d 955 (9th Cir. 1968); *Heilig v. Studebaker Corporation,* 347 F. 2d 686 (10th Cir. 1965); *Gadaleta v. Nederlandsch-Amerekaansche Sloomvart,* 291 F. 2d 212, 213 (2nd Cir. 1961). As stated in *Victory Carriers, Inc. v. Stockton Stevedoring Company, supra*:

> "An answer to an interrogatory is comparable to answers, which may be mistaken, given in deposition testimony or during the course of the trial itself. Answers to interrogatories must often be supplied before investigation is completed and can rest only upon knowledge which is available at the time. When there is conflict between answers supplied in response to interrogatories and answers obtained through other questioning, either in deposition or trial, the finder of fact must weigh all of the answers and resolve the conflict."

The court properly declined to answer the question dealing with the location of the switch train at the time of the accident.

Plaintiff also contends that there was no substantial evidence to support the verdict and claims he was denied a fair and impartial trial because the jury did not represent a fair cross-section of the community. The District Court, in overruling plaintiff's motion for a new trial, found these issues to be without merit and we agree.

Affirmed.

Peck, Circuit Judge, concurring. While I concur in the result reached in the majority opinion, it seems to me that it goes further than we are required to go under the circumstances of this case.

It is apparent from the record that the "yard limits" are not capable of precise delineation. In such a situation

both logic and the authorities support the conclusion of the majority opinion that defendant's response during the early discovery procedure period to an interrogatory to the effect that the train was not within the yard limits at the time of the occurrence should not be binding on it. Thus I agree that the defendant was entitled to offer evidence on this point even though it be inconsistent with the answer to the interrogatory, and that the requested instruction describing that answer as an admission against interest was properly denied. However, the majority opinion goes on to quote with apparent approval from *Victory Carriers, Inc. v. Stockton Stevedoring Company,* 388 F. 2d 955 (9th Cir. 1968) as follows: "An answer to an interrogatory is comparable to answers, which may be mistaken, given in deposition testimony or during the course of the trial itself." That statement, which is pure dicta, seems to say that even the direct testimony of a party from the witness stand is not binding on him. It is interesting to note that *Victory Carriers* is cited by Professor Moore (4 W. Moore ¶33.29[2] (2d ed.)) simply for the proposition that answers to interrogatories are not *always* binding, a proposition which provides sufficient basis for the result we reach in the present case. It is further noted that neither *Gadaleta v. Nederlandsch-Amerekaansche Sloomvart,* 291 F. 2d 212 (2d Cir. 1961) nor *Heilig v. Studebaker Corporation,* 347 F. 2d 686 (10th Cir. 1965), also cited in the majority opinion, stands for any broader rule of law.

I would affirm the conclusion of the District Court on the ground that defendant's response during the discovery procedure period to an interrogatory not capable of a precise answer was not binding on it, leaving open the question of whether an answer to an interrogatory might not in other circumstances be binding on a party.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 20,872

FLOYD W. FREED, III,
Plaintiff-Appellant,

vs.

THE ERIE LACKAWANNA RAILWAY COMPANY,
Defendant-Appellee.

BEFORE: Peck, Brooks, Kent, Circuit Judges

JUDGMENT

Entered July 16, 1971

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

It is further ordered that defendant-appellee recover from plaintiff-appellant the costs on appeal as certified below and that execution therefor issue out of said District Court.

Entered by order of this Court.

JAMES A. HIGGINS, *Clerk.*

Supreme Court, U.S.
FILED
NOV 24 19

In the Supreme Court of the United States

No. 71-526.

OCTOBER TERM, 1971.

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SUPREME COURT, U. S.

FLOYD M. FREED III,
Petitioner,

vs.

ERIE LACKAWANNA RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

ROBERT C. McFADDEN,
1144 Union Commerce Bldg.,
Cleveland, Ohio 44115,
Attorney for Respondent.

Of Counsel:
ARTER & HADDEN.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

No. 71-526.
OCTOBER TERM, 1971.

FLOYD M. FREED III,

Petitioner,

vs.

ERIE LACKAWANNA RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI.

NATURE OF THE CASE.

This is a question under the Federal Employers Liability Act, 45 U.S.C. 51, *et seq.*, brought by petitioner Freed, a brakeman for the Erie-Lackawanna, tried to a jury in federal court in Cleveland.

The jury returned a verdict for defendant Railroad.

Judge Kalbfleisch, the trial judge, overruled petitioner's motion for new trial (Petitioner's Brief, pp. 13-17), and the United States Court of Appeals for the Sixth Circuit (Judges Peck, Brooks and Kent) affirmed. 445 F.2d 619 (Petitioner's Brief, pp. 18-21).

THE ACCIDENT.

Petitioner Freed was head brakeman for the crew bringing a mainline freight train into the switching area at North Randall, a suburb of Cleveland (R. 132, 135, 136). The conductor had received permission for the crew to stop at North Randall, leave the train, and go to luncheon at one of the restaurants bordering Ohio Highway 8 at North Randall (R. 55, 56, 112-115).

While the engineer, who was to stay with the train while the others were at luncheon, slowly moved the freight to clear the switches for the switching crew which at that time was engaged in switching operations in the North Randall yards, petitioner Freed and the fireman dropped off the train (R. 54-61, 171, 333, 334). The pair crossed two sets of tracks, and, walking alongside the adjacent sidetrack, started toward the restaurant (R. 54, 60, 61, 139, 295). Petitioner Freed's companion, the fireman, discovered he had left his cigarettes in the cab of the locomotive, and called to the engineer to throw them to him (R. 61). Petitioner Freed stopped to watch the retrieval of the cigarettes, and was somehow struck by the corner of the caboose which the switching crew was slowly backing in carrying on its switching operations (R. 62, 140, 141, 279, 294, 334, 338). For injury so received, petitioner Freed brought suit.

THE RECORD PRESENTS NO QUESTION CALLING FOR REVIEW HERE.

The questions petitioner Freed would present, do not arise on this record.

Evidence concerning the character of the area, and that the operations in North Randall were conducted under yard rules, *was received without objection by petitioner;* both parties recognized that the questions now urged by petitioner, created issues of fact for the jury. They were so argued to the jury. Following the argument, the court charged the jury. No objection was taken by petitioner to the charge, except to a minor point relating to damages—which the jury never reached.

Petitioner, having treated the questions as issues of fact, cannot now construct out of them questions of law.

This is an ordinary jury case, fairly tried to a jury.

CONCLUSION.

The writ should be denied.

Respectfully submitted,

ROBERT C. MCFADDEN,
1144 Union Commerce Bldg.,
Cleveland, Ohio 44115,
Attorney for Respondent.

Of Counsel:
ARTER & HADDEN.